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No. 83-87

In The

Supreme Court of the United States

October Term, 1983

BOARD OF EDUCATION OF PARIS UNION SCHOOL DISTRICT NO. 95, TERRANCE C. PARKS, CHARLES R. FOX and BERNIE RINEHART,

Petitioners,

vs.

JESSE A. VAIL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois School Code, *Ill. Rev. Stats.* (1981) Chapter 122, Section 1-1 et. seq., prohibits a two (2) year term of probationary employment.

2. Whether Respondent had a legitimate claim of entitlement to continued employment for one (1) more year based on his mutually explicit understanding with the School Board (Petitioners).

3. Whether a statutory tenure scheme precludes any other type of "property" interest in an academic setting.

4. Whether Respondent was entitled to a predeprivation hearing when terminated during his term of employment by a deliberate, considered decision of the School Board (Petitioners).

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BRIEF FOR RESPONDENT

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to those constitutional and statutory provisions included in Petitioners' Brief, the following statutory provisions are involved:

Illinois Revised Statutes (1981) Chapter 122:

10-20. *Duties of the School Board.* The School Board has the duties enumerated in Sections 10-20.1 through 10-20.30.

10-20.7. *Appoint Teachers and Fix Salaries.* To appoint all teachers and fix the amounts of their salaries, subject to limitations set forth in this Act.

10-21. *Additional Duties of the Board.* Boards of Education in addition to the duties enumerated above, shall have the additional duties enumerated in Sections 10-21.1 through 10-21.6.

10-21.1. *Employment of Teachers.* To examine teachers by examinations supplemental to any other examinations and to employ teachers and fix the amount of their salaries subject to limitations set forth in this Act.

STATEMENT OF THE CASE

Respondent accepts Petitioners' discussion of the facts contained in their Statement (of the case), except for one glaring omission: they failed to note that Respondent *accepted* their explicit offer of two (2) years' employment, thereby creating a contractual commitment. Following that acceptance, Respondent left his residence in Joliet, Illinois, where he and his family had lived for thirteen (13) years, left a job he had held for ten (10) years, and took a salary cut to assume the position in Paris, Illinois.

Respondent also objects to the portion of Petitioners' Statement (Brief, p. 3), which discusses selected pro-

visions of Illinois' School Code and statutory tenure scheme. That discussion omits reference to the general grant of authority to Petitioners to "appoint all teachers and fix the amount of their salaries, subject to the limitations set forth in this Act." *Ill. Rev. Stat.* (1981) Chapter 122, Section 10-20.7 and Section 10-21.1. The Illinois School Code contains no time limitations on the contracts to be offered to probationary teachers.

Respondent accepts the balance of Petitioners' Statement (of the case).

SUMMARY OF ARGUMENT

The Court of Appeals for the Seventh Circuit affirmed the finding of the trial court that Petitioners' "commitment" to provide the Respondent with a two (2) year term of employment constituted a "property" interest protectable under due process. The finding was affirmed on alternate grounds that (1) the Illinois School Code[1] itself permitted such a two (2) year commitment, thereby giving the Respondent an enforceable contract right, *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1438-40 (7th Cir. 1983) [hereinafter *"Vail"*] and (2) even in the absence of such an enforceable contract right under state law, the mutually explicit understanding of the parties was sufficient to create a legitimate claim of entitlement under the Con-

[1]The Illinois School Code is found at *Ill. Rev. Stat.* (1981) Chapter 122, Section 1-1, *et seq.* It will be referred to in this Brief as the "School Code" or the "Code."

stitution and Civil Rights Act. *Id.* at 1440-41. The first two sections of Petitioners' argument are directed at challenging this finding.

I. In the first part of their argument, Petitioners assert that their two (2) year offer was unauthorized by *state* law. They then conclude—without argument or explanation—that Respondent is thereby precluded from asserting a federal claim. The interpretation of the Illinois School Code by the Court of Appeals for the Seventh Circuit was based on extensive briefing and argument by the parties. The School Code does not specifically address this issue, and there are no state Supreme Court or lower court opinions even discussing the issue. The Court of Appeals for the Seventh Circuit has on numerous occasions construed and interpreted various provisions of the Illinois School Code. Under comparable circumstances, this Court has accepted the interpretation of state law in the lower court opinion, even if an examination of the state law issue without such guidance might have justified a different conclusion. *See, e. g., Bishop v. Wood*, 426 U. S. 341, 345-6, 96 S. Ct. 2074, 2078 (1976) (and footnote 10 therein). In any event, the finding of the Court of Appeals that the Petitioners' two (2) year offer was not prohibited by the Code is clearly supported by the language of the Code and its legislative history. See argument below.

More significant to this appeal is Petitioners' unstated assumption that state law alone determines the legitimacy of claims of entitlement under the Constitution and Civil Rights Act. This assumption raises the issue of whether, on the facts presented, the Respondent had a right — under the Constitution and Civil Rights

Act — to rely on the promises of the highest officials of local government. The following question of law is raised: Can the actions of the highest officials of local government, taken under color of law, generate a legitimate claim of entitlement amounting to a "property" interest under the Due Process Clause and Civil Rights Act? Under these circumstances, we must distinguish between the underlying Constitutional right to be free from arbitrary actions by government officials, and the specific "property" right which the Respondent seeks to protect, i. e., a legitimate claim of entitlement to two (2) years' employment; a claim which was not created by the Constitution, but rather was created by "an independent source such as state law," to-wit: the (arbitrary) actions of the governing authorities—taken under color of law—which created a reasonable expectation on the part of the Respondent.

In this portion of the Brief, Respondent will first address the question of the authority under state law for the offer of two (2) years of probationary employment, which could clearly form a basis for the creation of a "property" interest under due process, and then address the question of whether actions of high level government officials taken under *color* of law are sufficient to create a protectable interest under the Due Process Clause.

The Petitioners offered and Respondent accepted employment for a two (2) year term. They then terminated him *during* his two (2) year term—without stated cause and without a hearing. Regardless of whether Petitioners had actual authority under state law to extend an offer of two (2) years employment to Respondent, the evidence clearly supports the finding that Respondent

had a "legitimate claim of entitlement" under federal constitutional law based on the mutually explicit understanding of the parties that he would be employed for two (2) years. *Leis v. Flynt*, 439 U. S. 438, 99 S. Ct. 698 (1979); *Perry v. Sindermann*, 408 U. S. 493, 92 S. Ct. 2694 (1972); *Board of Regents v. Roth*, 408 U. S. 564, 92 S. Ct. 2701 (1972). Federal constitutional law is not totally dependent on or subordinate to state law in determining the legitimacy of claims of entitlement under the Due Process Clause. As stated in *Memphis Light, Gas & Water Division v. Craft*, 436 U. S. 1, 9, 98 S. Ct. 1554, 1560 (1978) (citations to *Roth* omitted):

> Although the underlying substantive interest is created by "an independent source such as state law", federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

A contrary ruling would have grave implications, for it would not only condone certain types of arbitrary government action, it would raise it to the level of a defense to a due process claim.

II. While Petitioners assume in the first portion of their brief that Respondent must have a contract right enforceable under *state* law in order to assert a federal claim, in the second portion of their Brief they argue that an enforceable contract right would be *insufficient* to state a federal claim. Although Respondent does not claim (and has never claimed) tenure, Petitioners seem to argue that no interest other than tenure—whether contractual or otherwise—can constitute a protectable interest under federal law, when a statutory tenure system is in operation.

It is Respondent's position that under the teachings of *Roth* and *Sindermann*, tenure is *not* the only conceiv-

able protectable interest in academia, and that the legitimacy of claims of entitlement cannot and should not be limited to a few rigid, technical forms, especially where those claims arise out of mutually explicit understandings with governing authorities which do not contradict or infringe on statutory benefit schemes. *Roth*; *Sindermann*. Where a claim of entitlement is supported by state statute or rule, its legitimacy is self-evident. Its legitimacy is also established where the claim of entitlement arises out of legitimate and reasonable reliance on a mutually explicit understanding with the highest governing authorities—acting under color of law—that does not conflict with statutory benefit schemes. *Roth; Sindermann*. Were it otherwise, the arbitrary[2] actions of government officials would be transformed from the gist of a due process claim to a defense of such claim. Neither the Constitution nor the cases dictate such a result.

III. In the third portion of their argument, Petitioners actually incorporate by reference the dissenting appellate judge's opinion in *Vail* on the significance of *Parratt v. Taylor*, 451 U. S. 527, 101 S. Ct. 1908 (1981) to this case. Though they initially argued that Respondent had no enforceable contract right under state law, they now imply that he has an adequate state common law remedy for breach of contract which is sufficient to satisfy due process. It is Respondent's position that even if he had an enforceable breach of contract claim, this fact alone would not satisfy the requirements of due process under *Parratt* where a predeprivation hearing is both feasible and practical.

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[2]Arbitrary in the sense that they are unauthorized by state law.

ARGUMENT

I. The Court Of Appeals For The Seventh Circuit Properly Concluded That Respondent Had A Legitimate Claim Of Entitlement To Continued Employment For One (1) More Year.

Petitioners argue, contrary to the finding of the Court of Appeals for the Seventh Circuit, that under the Illinois School Code, probationary teachers are limited to two (2) "separate" one (1) year contracts in completing the two (2) year probationary term (Brief, pp. 7, 15). This issue of statutory construction was thoroughly briefed and argued in the appeal below. If this Honorable Court affirms the decision of the Court of Appeals for the Seventh Circuit on this issue, it follows that Respondent had a contract right, which clearly constitutes a protectable property interest under the Constitution and Civil Rights Acts.

A. The Illinois School Code Does Not Prohibit A Two (2) Year Contract With A Probationary Teacher.

In claiming error on this point, Petitioners argue that they exceeded their own powers in extending the two (2) year offer, and that the School Code limits probationary teacher contracts to two (2) "separate" one (1) year terms. The Illinois School Code does not specifically address the issue of School Board authority to offer a two (2) year probationary term, such as was offered to Respondent in this case. Petitioners admit that the Illinois Supreme Court has yet to rule on the issue (Brief, p. 18).

There are no reported opinions discussing the issue.[3] In the absence of express statutory provisions or controlling judicial construction, they cite state appellate court opinions discussing general principles of statutory construction and legislative intent, none of which even discuss this issue.

The Illinois School Code contains a general grant of authority to school boards to "appoint all teachers and fix the amount of their salaries, *subject to the limitations set forth in this Act.*" (emphasis supplied). *Ill. Rev. Stat.* (1981) Chapter 122, Section 10-20.7 and Section 10-21.1. While there are several express statutory time limits in the School Code relating to specific types of contracts,[4] there is no provision in the Code placing an express statutory time limit on contracts to be offered to probationary teachers. This stands in contrast to express restrictions placed on the parallel grant of power to the Chicago Board of Education under Section 34-16 of the Code. That restriction is expressly stated in Section 34-49, limiting the power of the Board to enter into employ-

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[3]The Seventh Circuit's opinion in *Hostrop v. Board of Junior College District No. 515*, 523 F. 2d 569 (7th Cir. 1975), *cert. den.* 425 U. S. 963, 96 S. Ct. 1748 (1976), suggests that such authority exists, citing several early Illinois Supreme Court opinions at 574-75.

[4]§§10-22.11, 10-22.12, and 10-22.35a relating to leases and purchases of school property; § 10-22.25a relating to installment contract purchases of personal property; § 10-22.31 relating to special education cooperative agreements; § 10-22.31a relating to other joint educational agreements; § 10-22.34b relating to utilization of non-certified personnel; § 10-23.4 relating to purchase of school buses; § 10-23.4a relating to leasing of equipment and machinery; §10-24-6.1 relating to teacher sabbatical leaves.

ment contracts with individuals or groups of employees for any period exceeding three (3) years.[5]

These comparisons of provisions in the School Code indicate that the grant of authority in Sections 10-20.7 and 10-21.1 is not subject to any one (1) year limitation. *See Libertyville Education Association v. Board of Education of School District No. 70, Lake County*, 56 Ill. App. 3d 503, 371 N. E. 2d 676 (2nd Dist. 1977). The *Libertyville* case acknowledges the earlier holding of the Court of Appeals for the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515*, 523 F. 2d 569, 574-75 (7th Cir. 1975), *cert. den.* 425 U. S. 963, 96 S. Ct. 1748 (1976), that passage of the modern tenure provisions of the Illinois School Code was not intended to reinstate the limitations on duration of employment contracts established under earlier School Codes in the last century. *Id.*, at 506, 371 N. E. 2d at 678.

It must be emphasized that the Respondent does not claim any right to tenure under the Illinois School Code. He merely claims an agreement for a two (2) year probationary term as promised by the Petitioners. As found by the Court of Appeals for the Seventh Circuit, the School Code contemplates just such a two (2) year probationary period in Section 24-11. *Vail*, 706 F. 2d at 1439.

The only statutory language invoked by Petitioners to support a one (1) year limitation on their authority is contained in later paragraphs of Section 24-11 delineating the procedure by which a one (1) year probationary

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[5]This was originally a one (1) year limitation. It was amended to three (3) years after some critical comments on any such restriction in *Board of Education (Chicago) v. Chicago Teachers Union Local 1*, 26 Ill. App. 3d 806, 326 N. E. 2d 158 (1st Dist. 1975).

teacher may be "re-employed." See Section 24-11. Its application is clearly limited to procedures for termination at the *end* of a term of employment, and would have no application to termination *during* a term of employment, such as occurred in the case at bar. It does not prohibit or even suggest that a two (2) year contract is not permitted under the Code. *Vail*, 706 F. 2d at 1439.

Respondent submits that, in the absence of express statutory direction or controlling state authorities, this Court should accept the interpretation of state law by the District Court and the Court of Appeals for the Seventh Circuit, as it has generally done in prior cases under comparable circumstances. *See, e. g., Bishop v. Wood*, 426 U. S. 341, 345-46, 96 S. Ct. 2074, 2078, fn. 10 (1976).

B. The Respondent Has A Legitimate Claim Of Entitlement Under The Constitution And Civil Rights Acts Even In The Absence Of An Enforceable Contract Right Under State Law.

Even assuming *arguendo* that the Petitioners' two (2) year offer was without authority in state law, Respondent contends that he has established a "legitimate claim of entitlement" under the Due Process Clause and Section 1983.

Although Petitioners have chosen to raise an issue of interpretation and construction of an unresolved question of state law, more important to this Court's review is their assumption[4] that state law alone determines the

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[4]In their appeal to the Court of Appeals for the Seventh Circuit, Petitioners expressly argued that a claimant must have a contract right enforceable under state law before he could assert a federal claim.

legitimacy of federal Constitutional claims. In this case, the Petitioners promised and agreed to employ the Respondent for a term of two (2) years. They now argue that they had no authority in *state* law to do precisely what they did. They then assume—without argument or explanation and in spite of the mutually explicit understanding of the parties—that because their own action was prohibited by state law, Respondent has no claim under federal law. The implication that Respondent's federal claim is totally dependent upon provisions of state law disregards this Court's admonition that:

> Although the underlying substantive interest is created by "an independent source such as state law," federal constitutional law determines whether that interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Memphis Light, Gas & Water Division v. Craft, 436 U. S. 1, 9, 98 S. Ct. 1554, 1560 (1978) (citations to *Roth* omitted). *See, generally*, Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L. Rev. 405, 434-44 (1977).

In effect, Petitioners are attempting to use their own violation of state law as a defense to Respondent's federal civil rights claim. If their argument were to become law, then the arbitrary actions of the highest governing officials, though taken under color of law, would be insulated from constitutional scrutiny by the very fact that such actions were unauthorized by state law. This would transform the gist of a due process claim into a defense of such a claim. The result would subordinate the Constitution to state law. Neither the Constitution nor the cases dictates such a result.

1. *A mutually explicit understanding with governing authorities can create a legitimate claim of entitlement under the due process clause.*

The procedural safeguards of due process "have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on *arbitrary* government action." L. Tribe, *American Constitutional Law*, Sections 10-7 to 10-9 (1978) (emphasis supplied). *See, e. g., Goss v. Lopez*, 419 U. S. 565, 574, 95 S. Ct. 729, 736 (1978). Arbitrary government action can take many forms. Though it might typically occur in the deprivation of some recognized benefit, the case at bar evidences another type of arbitrary action, to-wit: creation of a legitimate expectation through a mutually explicit understanding, followed by its deprivation in violation of such explicit understanding. Because arbitrary government action can create as well as deprive one of expectations of entitlement, the Due Process Clause must reach deprivation of such *arbitrarily created* expectations if they amount to "legitimate claims of entitlement." The Due Process Clause should not condone arbitrary action in creation of a legitimate expectation while prohibiting such action in its deprivation. To assure that the Due Process Clause will be an effective check on arbitrary government action, this Court should reaffirm the admonition in the *Memphis Light* case that the legitimacy of a claim of entitlement under the Due Process Clause will be determined by federal Constitutional law, not state law. *Id.* at 9, 98 S. Ct. at 1560. *Cf. Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 102 S. Ct. 1148 (1982) (State statutory procedures which deprive one of a state-created entitlement must be analyzed in constitutional terms.)

This does not indicate or imply that such claims of entitlement can be created by the Constitution or federal law.

It is well established that such claims must be created "by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U. S. 564, 577, 92 S. Ct. 2701, 2709 (1972). Further, in order to support a claim of entitlement based on an understanding, such understanding must be "mutually explicit." *Perry v. Sindermann*, 408 U. S. 593, 601, 92 S. Ct. 2694, 2699 (1972).

Following *Roth* and *Sindermann*, this Court has indicated that a mutually explicit understanding can be a source of a legitimate claim of entitlement. In *Leis v. Flynt*, 439 U. S. 438, 442, 99 S. Ct. 698, 701 (1979), the Court cited *Sindermann* in reiterating that a claim of entitlement may be "derived from statute *or* legal rule *or* through mutually explicit understanding" (emphasis supplied). *Flynt* rejected a contention that Respondents were entitled to appear *pro hac vice* before an Ohio trial court, because they had not shown the "requisite *mutual* understanding" (*Flynt*, 439 U. S. at 443, 99 S. Ct. at 701). The Court's opinion indicated that Respondents would have prevailed, despite express provisions of state law vesting the trial court with discretion in approving such appearances, if Respondents had been able to show such a *mutual* understanding.[7]

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[7]Petitioners' argument in the case at bar, that this Court found it "unnecessary" (Brief, p. 25) to reach this "factual" issue in *Flynt*, finds no support in the Court's language. The record was simply "devoid" of any evidence to support such a finding. *Id.* at 442, 99 S. Ct. at 701. Likewise, Petitioners' reliance on *Bishop v. Wood*, 426 U. S. 341, 96 S. Ct. 2074 (1976) is misplaced because the issue was not raised by the evidence.

"[T]he interpretation and application of the Due Process Clause are intensely practical matters. . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'. *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895, 81 S. Ct. 1743, 1748 (1961)." *Goss v. Lopez*, 419 U. S. 565, 574, 95 S. Ct. 729, 736 (1975). To hold that mutually explicit understandings need not be authorized by state law in order to create legitimate claims of entitlement under federal law will confirm the supremacy of federal over state law, preclude reliance on arbitrary government action as a defense to a due process claim, and assure the effectiveness of the Due Process Clause in reaching all types of arbitrary government action.

In this case, the source of Respondent's claim of entitlement was the Petitioners' offer of two (2) years of employment. That offer, whether or not authorized by state law, generated the requisite mutually explicit understanding relied on by Respondent. The question remains as to whether that mutually explicit understanding is sufficient, under the circumstances of this case, to constitute a "legitimate claim of entitlement." See *Sindermann*, 408 U. S. at 602-3, 92 S. Ct. at 2700. The question of whether the understanding was authorized by state law is "but one factor" to be considered in determining the legitimacy of Respondent's claim. *Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347, 351 (6th Cir. 1975).

2. *Determining Legitimacy of Claims of Entitlement.*

The starting point for an analysis of the issue of legitimacy of claims of entitlement is Justice Stewart's language in *Roth* (408 U. S. at 577, 92 S. Ct. at 2709):

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Most significant to the case at bar, Justice Stewart identified the "purpose of the ancient institution of property":

> . . . to protect those claims upon which people *rely* in their daily lives, *reliance* that must not be arbitrarily undermined. (*Id.*) (emphasis supplied)

As further explained, a claim of entitlement must

> stem from an independent source such as state law —rules *or understandings* that secure certain benefits and that support claims of entitlement to those benefits. (*Id.*) (emphasis supplied)

In *Sindermann,* it was explained that such understandings must be "mutually explicit" in order to create a legitimate claim of entitlement. 408 U. S. at 601, 92 S. Ct. at 2699.

Since this Court's opinions in *Roth* and *Sindermann,* a great number of cases have discussed the legitimacy of claims of entitlement in Section 1983 actions. Where the basis or source of a claim of entitlement is in state statute or legal rule, the Court's consideration of legitimacy has been so limited. *See, e.g., Bishop v. Wood,* 426 U. S. 341, 96 S. Ct. 2074 (1976) and *Leis v. Flynt,* 439 U. S. 438, 99 S. Ct. 698 (1979) (*per curiam*). Where, however, the claimant relies on a mutually explicit understanding with government officials acting under color of law, the analysis of the issue should not be so limited. As has been said under similar circumstances, the "inquiry should be broad-gauged. Reason and *shared* expectations should be consulted to define the scope of the claimant's 'justifiable'

expectations." *O'Bannon v. Town Court Nursing Center*, 447 U. S. 773, 797 (1979) (Blackmun, J., concurring) (emphasis supplied). *See also Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347 (6th Cir. 1975); *Thomas v. Ward*, 529 F. 2d 916 (4th Cir. 1975). A review of lower court opinions discloses certain factors which are useful in evaluating the legitimacy of claims of entitlement founded on mutually explicit understandings with government officials acting under color of law.[8]

First and foremost, as stated in *Flynt*, *Roth* and *Sindermann*, there must be a "mutually explicit understanding." Mere informal assurances will not suffice.[9] Further, that understanding must create an existing status, not promise some future status.[10] Additionally, to be legitimate, the understanding relied on by the claimant must

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[8]In their Brief, Petitioners assert (at p. 24, fn. 6) that a number of federal courts of appeals' decisions since *Roth* and *Sindermann* which deny claims of entitlement are based on the fact that the claims were "at odds" with statute or rule. This oversimplification will not withstand analysis of the cases, most of which did not involve explicit understandings with governing authorities to support the legitimacy of the claims of entitlement, or involved other factors which prohibited a finding of legitimacy.

[9]*See, e. g., McElearney v. University of Illinois*, 612 F. 2d 285 (7th Cir. 1979); *Stebbins v. Weaver*, 537 F. 2d 939 (7th Cir. 1976), *cert. den.*, 429 U. S. 1041 (1977); *Haimowitz v. University of Nevada*, 579 F. 2d 526 (9th Cir. 1978); *Bertot v. School District No. 1, Albany County, Wyoming*, 522 F. 2d 1171 (10th Cir. 1975); *Cusumano v. Ratchford*, 507 F. 2d 980 (8th Cir. 1974).

[10]*McElearney; Haimowitz; Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976); *Plummer v. Board of Regents*, 552 F. 2d 716 (6th Cir. 1977); *Bertot; Cusumano.*

be fostered by governing authorities.[11] A claimant could not legitimately rely on assurances from a government official who, under the circumstances, is clearly not authorized to extend such assurances, whether by his own level of authority, or by other indications of lack of authority.[12]

Provisions of state law, though not conclusive, are relevant in determining the legitimacy of claims of entitlement based on mutually explicit understandings. Where such explicit understandings clearly contradict higher authority, e.g., statute of rule, they may be insufficient to support a finding of legitimacy.[13] Where, however, the understanding is not clearly inconsistent with existing statutory benefit schemes relating to the benefits at issue,

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[11]The requirement that the understanding be reached with governing authorities satisfies another requirement of a civil rights action in those claims asserted against the government entity itself. If the understanding is reached by officials whose actions "may fairly be said to constitute official policy," it fulfills the requirement that the state be directly implicated in the wrongful or arbitrary conduct. *See Monnell v. Department of Social Services*, 436 U. S. 658, 692, 98 S. Ct. 2018, 2035-36 (1978). *See also, Quinn v. Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (2nd Cir. 1980).

[12]*See Bollow v. Federal Reserve Bank of San Francisco*, 650 F. 2d 1093 (9th Cir. 1981); *Ventetuolo v. Burke*, 470 F. Supp. 887 (D. R. I., 1978), *aff'd.* 596 F. 2d 476 (1st Cir. 1979); *Mack v. Cape Elizabeth School Board*, 553 F. 2d 720 (1st Cir. 1977).

[13]*See, e. g., Quinn v. Syracuse Model Neighborhood Corp.*, 613 F. 2d 438, 448 (2nd Cir. 1980) (". . . state law clearly rejects any inference of legitimate entitlement"); *Moore v. Otero*, 557 F. 2d 435, 437 (5th Cir. 1977) (municipal code "could not be clearer that a corporal serves . . . at the pleasure of the chief of police"). *See also, Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976) (where assurances of statutory tenure were in conflict with clear language of statute).

a finding of legitimacy should be upheld.[14] This is especially true where the understanding is reached with the highest governing authorities.[15]

3. *Analysis of the Case at Bar.*

All of the concepts discussed in the above analysis reside in the profound words of Justice Stewart originally quoted above from *Roth:*

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those *claims upon which people rely in their daily lives*, reliance that must not be *arbitrarily* undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U. S. at 577, 92 S. Ct. at 2709 (emphasis supplied).

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[14]This analysis of the relevance of state law explains the intent behind Justice Stewart's comment in Footnote 7 of the *Roth* opinion at 408 U. S. at 602, 92 S. Ct. at 2700; for if it were clear under the law of Texas that a teacher in respondent's position had no contractual or other claim to job tenure, the legitimacy of respondent's claim would have been destroyed. *See also Soni v. Board of Trustees of University of Tennessee*, 513 F. 2d 347 (6th Cir. 1975) (where claimant, an alien, was assured of continued employment by governing authorities, despite state law and university regulations which *all parties understood* would prohibit an alien from obtaining statutory tenure; Held: legitimate claim of entitlement was established).

[15]Respondent has been unable to locate any cases where the mutual understanding involved the highest officials of local government. *Cf. Ventetuolo v. Burke*, 596 F. 2d 476, 481 (1st Cir. 1979) (where claimant "knew or should have known that the director did not have the authority [claimant] sought to impute to him."). *But cf., Bollow v. Federal Reserve Bank of San Francisco*, 650 F. 2d 1093, 1099-1100 (9th Cir. 1981) (where, in a claim against federal authorities, the court said that "anyone who deals with the government assumes the risk that the agent acting in the government's behalf has exceeded the bounds of his authority.").

In the case at bar, the Respondent relies on a mutually explicit understanding creating an existing status. Because the understanding was fostered by the highest governing authorities, and did not clearly contradict or infringe on existing statutory benefit schemes, the legitimacy of Respondent's claim of entitlement is established. Petitioners' unstated assumption that state law alone will determine whether Respondent has a legitimate claim of entitlement under federal law must be rejected.

II. The Illinois Statutory Tenure System Does Not Preclude Respondent's Claim Of Entitlement To A Second Year Of Probationary Employment.

While Petitioners assume in the first portion of their argument that Respondent must have a contract right enforceable under state law in order to assert a federal claim, in the second portion of their argument they assert that an enforceable contract right would be insufficient to state a federal claim. Although Respondent does not claim (and has never claimed) tenure, Petitioners apparently argue that where a statutory tenure scheme exists, no property interest other than tenure—whether contractual or otherwise—can constitute a protectable interest under federal law. It is Respondent's position that tenure is *not* the only conceivable protectable interest in academia, and the legitimacy of claims of entitlement cannot and should not be limited to such a rigid, technical form, especially where those claims arise out of mutually explicit understandings

with governing authorities that do not clearly contradict or infringe on statutory benefit schemes. See argument above.

It is difficult to discern the gist of Petitioners' argument in this portion of their Brief. On the one hand, they assume for this portion of their argument that a two (2) year probationary contract is authorized under Illinois law (Brief, pp. 8, 22). Yet, on the other hand, they argue that they do not have the "authority or power to enlarge the limits of teacher tenure beyond statutory limits." (Brief, p. 9). This argument seems to miss the point entirely. Petitioners did not promise and Respondent does not claim entitlement to tenure. Therefore, their actions in offering him a two (2) year probationary contract did not "enlarge the limits of teacher tenure beyond statutory limits." (Brief, p. 9)

To the extent that Petitioners attempt to argue lack of authority to extend a two (2) year commitment, it is inconsistent with their threshold assumption that a two (2) year probationary contract is permitted. Further, the lack of authority argument was analyzed and refuted earlier in this Brief.

Petitioners rely in this portion of their argument on *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074 (1976) and *Leis v. Flynt*, 439 U.S. 438, 99 S.Ct. 698 (1979) (*per curiam*). Both cases are easily distinguishable as not involving mutually explicit understandings. The claimant in *Bishop* relied only on statutes and length of service. *Id.*, 426 U.S. at 344, 96 S.Ct. at 2077. He did not allege any mutually explicit understanding. Likewise in *Flynt*, the claimants relied on long-standing practices in exercis-

ing expressly retained discretion. *Id.*, 439 U.S. at 441, 99 S.Ct. at 700. No law *or* mutually explicit understanding supported their claim.

Petitioners' also cite *Ryan v. Aurora Board of Education*, 540 F. 2d 222 (6th Cir. 1976), again apparently arguing that legitimate claims of entitlement must be based solely in statutory authority. As pointed out by Respondent in his Brief in Opposition to Petition for Certiorari (p. 8), *Ryan* is easily distinguishable. Unlike the case at bar, where Respondent was terminated without stated cause or hearing *during* his term of employment, the plaintiffs in *Ryan* were simply not rehired at the *conclusion* of their terms of employment. The *Ryan* language relied on and quoted by Petitioners, that he (Ryan) could not have a legitimate claim to "continued employment" in the face of a statutory tenure system (540 F. 2d at 227), refers to a claim of ***indefinite*** continued employment, i.e., tenure, not a *limited* term of employment such as was claimed by Respondent herein. Significantly, a contrary ruling in *Ryan* would have contradicted and effectively overridden Ohio's statutory tenure system. For description, *see Id.*, at 224. In the case at bar, neither Petitioners' promise nor Respondent's right to complete the second year of his limited term of employment would have infringed on the Illinois statutory tenure scheme, which grants tenure upon entering a third continuous year of employment. *Ill. Rev. Stat.* (1981) Chapter 122, Section 24-11. Nor would it have infringed on any other statutory benefit scheme of the Illinois School Code. See argument above.

III. Parratt v. Taylor, 451 U. S. 527, 101 S. Ct. 1908 (1981), Does Not Foreclose Respondent's Claim Because A Predeprivation Hearing Was Practical And Post-Deprivation Remedies Are Inadequate And Speculative.

A. Assuming Respondent Has An Enforceable Breach Of Contract Claim, This Fact Alone Would Not Satisfy The Requirements Of Due Process Where A Predeprivation Hearing Is Both Feasible And Practical.

In the third portion of their Brief, Petitioners actually incorporate by reference the dissenting Appellate Judge's opinion on the significance of *Parratt v. Taylor*, 451 U. S. 527, 101 S. Ct. 1908 (1981), as it might apply to this case. Though they have argued initially that Respondent has no enforceable contract right under state law, they now imply[16] that he has an adequate state common law remedy for breach of contract, which is sufficient to satisfy due process. It is Respondent's position that even if he had an enforceable breach of contract claim, this fact alone would not satisfy the requirements of due process because termination of one's employment requires a predeprivation hearing where feasible and practical.

Parratt represents a recent effort of this Court to clarify judicial analysis of claims which allege facts that are commonly thought to state a common law claim normally dealt with by state courts, but instead, are couched in terms of Constitutional deprivation and relief under

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[16]Petitioners' language carefully avoids admitting the validity of any state claim.

the Civil Rights Act. *See Parratt*, 451 U. S. at 533, 101 S. Ct. at 1911-12 (Rehnquist, J.). It involved a relatively minor loss of property, based on allegations of negligence on the part of the state.[17] Because the deprivations were unintentional and unauthorized, predeprivation hearings were not practical or feasible. Since the deprivation involved "a tortious loss of . . . property as a result of a random and unauthorized act by a state employee" (*Id.* at 541, 101 S. Ct. at 1915), it was literally "beyond the control of the State." *Id.*, 101 S. Ct. at 1916. These facts, coupled with the existence of an adequate remedy under state law, led the Court to conclude that the requirements of due process were satisfied under these circumstances.

Appellate opinions following *Parratt* have not been consistent in analyzing its holding. One line of cases seems to indicate that *Parratt* precludes *any* procedural due process claim where adequate remedies for redress are available under state law. *E.g., Wolf-Lillie v. Sonquist*, 699 F. 2d 864 (7th Cir. 1983). Another line of cases analyzes procedural due process claims in the first instance in terms of the feasibility or practicality of providing some type of predeprivation process. *E.g., Weiss v. Lehman*, 676 F. 2d 1320 (9th Cir. 1982); *Coleman v. Turpen*, 697 F. 2d 1341 (10th Cir. 1982). *Parratt* has been said to make any intentional deprivation actionable, *McCoy v. Gordon*, 709

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[17]The facts disclosed that the deprivation was actually attributable to subordinate agents of the state, and a serious question of state action existed. See footnote 3 at *Parratt*, 451 U. S. at 537, 101 S. Ct. at 1913. Because the issue was not developed or preserved at the trial level, the Supreme Court assumed for purposes of its opinion, that this negligence was attributable to the governing authorities of the state. *Id.*

F. 2d 1060 (5th Cir. 1983), and has also been held to make random, unauthorized intentional acts inactionable. *Palmer v. Hudson*, 697 F. 2d 1220 (4th Cir. 1983).[18] Although this Court more recently emphasized the significance of the "practicality" issue, *e. g., Logan v. Zimmerman Brush Company*, 455 U. S. 422, 436, 102 S. Ct. 1148, 1157 (1982), this dichotomy of post-*Parratt* interpretations persists. Compare the concurring opinion of Judge Eschbach in *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1446-49 (7th Cir. 1983), with the dissenting opinion of Judge Posner in *Vail* at 1453-56.

An objective analysis of the *Parratt* opinion discloses the significance of the "practicality" analysis in resolving alleged violations of procedural due process. Nowhere does *Parratt* even hint that the existence of adequate state law remedies will satisfy the requirements of due process under all circumstances of deprivation of protected interests. In fact, the heart of the majority opinion in *Parratt* focused on the distinction between cases where predeprivation hearings were practical and those where such hearings were not practical. *Id.* at 537-40, 101 S. Ct. at 1914-15. *See also, Id.* at 546, 101 S. Ct. at 1918 (Blackmun, J., concurring) ("When it is possible for a State to

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[18]One might question whether a random, unauthorized intentional deprivation of property could form the basis of a *procedural* due process claim under *Parratt*'s "practicality" analysis. Query: How can the state be expected to provide a predeprivation hearing where the deprivation is effected by the intentional but random and unauthorized act of a low-level state employee? *See, e. g., Palmer v. Hudson*, 697 F. 2d 1220 (4th Cir. 1983). There is also a question of state action under such circumstances. *See Parratt*, 451 U.S. at 537, 101 S. Ct. at 1913, n. 3; *Monnell v. Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018.

institute procedures to contain and direct the intentional actions of its officials, it should be required, as a matter of due process, to do so.").

Parratt encompasses several different aspects of the "practicality" analysis. Of course, the threshold inquiry must be whether the deprivation is beyond the control of the state. *Id.* at 541, 101 S. Ct. at 1916. The need for rapid state action is another important consideration. *Id.* at 538-40, 101 S. Ct. at 1914-15; *Logan*, 455 U. S. at 436, 102 S. Ct. at 1157. Finally, considerations of practicality encompass a cost/benefit analysis such as originally appeared in *Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976). *See Parratt*, 451 U. S. at 541-43, 101 S. Ct. at 1916; *Logan*, 455 U. S. at 434, 102 S. Ct. at 1156.[19]

Deprivations involving a tortious loss of property as a result of a random and unauthorized act of a state employee epitomize those circumstances where a predeprivation hearing is impractical. Such circumstances stand in stark contrast to deprivations resulting from intentional, deliberate, considered actions of governing authorities of the state. *See Parratt*, at 546, 101 S. Ct. at 1918, (Blackmun, J., concurring); *Id.* at 548-49, 101 S. Ct. at 1919-20 (Powell, J., concurring); *Cf. Logan* (established state procedure). It is precisely such affirmative abuses by state officials in the exercise of governmental powers that the

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[19]There can be no contention that providing Respondent herein with minimal predeprivation procedure would be unduly costly or burdensome to the school district, which already provides statutorily mandated written notice, a statement of cause, and a hearing under similar circumstances, i. e., termination of second year probationary teachers and tenured teachers. *See Ill. Rev. Stat.* (1981) Chapter 122, Sections 24-11 and 24-12.

Civil Rights Act was meant to deter. *See Parratt*, 451 U. S. at 549, 101 S. Ct. at 1920 (Powell, J., concurring).

Judge Posner's dissenting opinion in *Vail* accords controlling significance to the statements in *Parratt* that predeprivation hearings have typically been required where the deprivations were authorized by an "established state procedure." *Vail*, 706 F. 2d at 1454. He posits that Respondent's termination was not accomplished through established state procedure, and therefore, *Parratt* precludes his claim. *Cf. Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 102 S. Ct. 1148 (1982) (claim upheld where deprivation was pursuant to established state procedure).

Attributing controlling significance to "established state procedure" would unduly restrict the import of the *Parratt* decision. Established state procedure is not the *sine qua non* of a valid procedural due process claim. It merely constitutes the most frequent and obvious example of a source of deprivation attributable to (*Monnell v. Department of Social Services*, 436 U. S. 658, 98 S. Ct. 2018 [1978]) and within the control of (*Parratt*) the state. The significance of the state's ability to anticipate and control the deprivation is apparent from the Court's analysis in distinguishing a "tortious loss of . . . property as a result of a random and unauthorized act of a state employee" from "established state procedure." The controlling distinction is said to be the fact that, in the former instance, "the State cannot predict precisely when the loss will occur." *Id.* at 541, 101 S. Ct. at 1915-16.

> It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under "color of law," is

> in almost all cases beyond the control of the State. Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation. (*Id.*)[20]

This analysis clearly demonstrates that the distinguishing factor is the State's ability to predict, anticipate and control the deprivation. *See also, Logan*, 455 U. S. at 434-35, 102 S. Ct. at 1156-57.

All of these aspects of the *Parratt* analysis provide support for the Respondent's claim of entitlement in the case at bar. In the first place, his loss of a job was clearly within the control of the state; indeed, it was "authorized,"[21] i. e., effected intentionally after consideration by the highest governing authorities. No imminent harm or emergency existed which would necessitate immediate government action. The claimant's interest in continued em-

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[20]Judge Eschbach, in his concurring opinion below, recognized that established state procedure merely exemplifies those circumstances wherein a deprivation is attributable to and within the control of the state. He reasoned that the Petitioners' discretionary action in authorizing the termination established the "procedure" for terminating individuals such as Respondent, which procedure was "to vote on the matter without providing such individuals with a reason for the decision, nor a meaningful opportunity to be heard." *Vail v. Board of Education of Paris Union School District No. 95*, 706 F. 2d 1435, 1448 (7th Cir. 1983) (Eschbach, J., concurring).

[21]Here, as in *Parratt*, "authorized" is used in the sense of authorized by governing officials, i. e., within their ability to control. The decision of Petitioners to offer and then renege on a two (2) year commitment was probably "random" in the sense that it deviated from "established state procedure." When governing authorities deviate from established state procedure, they should take such actions prudently, not arbitrarily.

ployment was substantial, and the requirement of minimal predeprivation process would surely serve as an additional safeguard against wrongful or arbitrary termination. *See Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976).[22]

B. Respondent's Post-Deprivation Remedies Are Inadequate And Speculative.

Moreover, to the extent that the adequacy of post-deprivation remedies is a factor in the *Parratt* analysis, the adequacy of the Respondent's remedies herein must be seriously questioned. Because *Parratt* involved a mere property damage claim, the only conceivable remedy under state *or* federal law was money damages. In cases of termination of employment, such as the one at bar, reinstatement is a significant remedy unavailable in state

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[22]One might question whether predeprivation process, where feasible, must be provided for deprivations of "insubstantial" or "minor" property interests. For example, a deliberate, considered decision by governing authorities to deprive the claimant in *Parratt* of his $23.50 hobby kit could theoretically require some type of predeprivation procedure, i. e., a statement of reasons for the deprivation. *Cf. Memphis Light, Gas and Water Div. v. Craft*, 436 U. S. 1 (1978) (where the Court held that termination of utility services required nothing more than pretermination notice of intent to terminate service and availability of an "informal" conference to discuss disputed matters). Notably, *Parratt* does not attribute any significance to the value or magnitude of the loss. It is submitted that the value or magnitude of a protectable interest should not determine whether its deprivation is worthy of constitutional scrutiny, but only whether a claimant received that process due under the circumstances. *See Parratt*, 451 U. S. at 536-37, 101 S. Ct. at 1913-14; *Mathews v. Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893 (1976).

court. *See Bessler v. Board of Education*, 69 Ill. 2d 191, 370 N. E. 2d 1050 (1977).[23]

More importantly, Petitioners themselves have argued at length that the Respondent has no enforceable contract right under state law. Therefore, as in *Logan*, a breach of contract suit "is apt to be a lengthy and speculative process." *Logan*, 455 U. S. 422, 102 S. Ct. at 1158. *See also, Rutherford v. United States*, 702 F. 2d 580 (5th Cir. 1983); *Weiss v. Lehman*, 676 F. 2d 1320, 1325-26 (9th Cir. 1982) (Boochever, J. dissenting).

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CONCLUSION

Respondent's procedural due process claim cannot be perceived as a mere "garden variety" contract action seeking damages for its breach. Upholding his due process claim would not "make the Fourteenth Amendment a font of (contract law) to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis*, 424 U. S. 693, 701, 96 S. Ct. 1155, 1160 (1976). *See also, Parratt v. Taylor*, 451 U. S. 527, 544, 101 S. Ct. 1908, 1917 (1981), and 451 U. S. at 550, 101 S. Ct. at 1920-21 (Powell, J., concurring). The differences between the federal and state interests in this type of claim were described in Judge Eschbach's concurring opinion in *Vail* at 1448, quoting from the earlier decision

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[23]In the case at bar, the second and final year of Respondent's term had nearly expired by the time the matter reached final judgment, thereby making reinstatement impractical. In other circumstances of wrongful termination of employment, reinstatement could be considered the preferred remedy.

of the Court of Appeals for the Seventh Circuit in *Hostrop v. Board of Junior College District No. 515*, 471 F. 2d 488, 494; n. 15 (1975):

> The fact that plaintiff relies upon his employment contract to establish a property interest worthy of protection through the Due Process Clause does not mean that his only remedy is a contract action in state court. A Civil Rights action based on the deprivation of due process and a contract action to recover damages for a breach are independent remedies. The Civil Rights action based on the deprivation of a property interest established by contract seeks vindication for the arbitrary manner in which a contract was breached. A "garden variety" contract action seeks damages only for the losses caused by the breach once it has occurred in any manner whatsoever. There will be occasions when one action will lie but the other will not, as when the state has grounds to break an employment contract, but does so by violating an employee's due process rights to notice and hearing.

It is important to note that any alleged deprivation of *procedural* due process must include an alleged deprivation of a substantive interest, such as a contract or property right. Such an underlying substantive interest is necessary to invoke procedural due process guarantees. The distinction between the substantive and procedural interests was recognized by this Court in *Carey v. Piphus*, 435 U. S. 247, 98 S. Ct. 1042 (1978), where it was held that one who is deprived of a substantive right *for cause*, but without due process, may only recover those damages from deprivation of the procedural right, and may not recover damages resulting from deprivation of the underlying substantive right.

In the case at bar, the Respondent specifically alleged in his Complaint that his termination was without a hearing *and* "without cause," i. e., alleged both a substantive and a procedural deprivation. (Complaint, Pars. 23, 28; Jt. App., pp. 10, 12). Petitioners' denial of these allegations put the question of "just cause" at issue. The trial court concluded that the record failed to establish just cause. (Findings of Fact, Conclusions of Law, Memorandum Opinion, and Final Order; Petition for Writ of Certiorari, App. 46). Where a plaintiff has established a procedural deprivation of a protectable (substantive) interest, the burden shifts to the defendant to demonstrate that the substantive deprivation was justified. *Carey,* 435 U. S. at 260; *Accord Mt. Healthy Board of Education v. Doyle,* 429 U. S. 274, 287, 97 S. Ct. 568 (1977). These principles indicate that if Petitioners had established just cause for the Respondent's termination at the trial, Respondent's damages would have been limited to those stemming from deprivation of the procedural right. *Carey v. Piphus,* 435 U. S. 247, 98 S. Ct. 1043 (1978).

The flexible guidelines of *Mathews v. Eldridge,* 424 U. S. 319 (1976) provide realistic and practical tools for resolving procedural due process claims. These guidelines take into consideration the value or magnitude of the substantive deprivation. This Court has said that, because of the importance to organized society that procedural due process be observed, see *Boddie v. Connecticut,* 401 U. S. 371, 375 (1971); *Anti-Facist Committee v. McGrath,* 341 U. S. at 171-172 (Frankfurter, J., concurring), such claims should be resolved regardless of the merits of a claimant's substantive assertions. *Carey v.*

Piphus, 435 U. S. 247, 266 (1977). For the same reasons, such claims should be resolved regardless of the value of the substantive assertion.

For all of the above and foregoing reasons, the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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